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## ABSTRACT

In the "United States v. the 'Progressive'," the United States government took a small left-wing magazine to court to prevent publication of an article on how a hydrogen bomb works. Amidst great controversy over what the article described and what data were secret and what were not, a federal judge granted an injunction against the "Progressive." The appeal of the injunction was set to be an important First Amendment test, but with similar articles appearing everywhere, the government decided to give up its case. The lack of a clear cut ruling did not please the editors of the "Progressive" or settle the fundamental disputes involved. Initial press coverage of the controversy depended on two distinct, opposing versions of the article, the government's and the "Progressive's." Some perceptive reporting did cover how the government had obtained the piece in the first place, and the issue of nuclear proliferation was given most careful coverage. Editorial reaction in 14 influential newspapers, including the "New York Times," "Washington Post," and "Chicago Tribune," was not unanimously in favor of the "Progressive's" position. After the injunction, however, most papers moved to the "Progressive's" side, citing concern for the fate of the First Amendment. In all, 40 journalism organizations or publications supported the magazine's appeal. Unfortunately, the lack of a final court decision leaves the press in an uncertain position regarding its First Amendment rights. (JL)

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BRUCE M. SWAIN

*The Progressive, the Bomb  
and the Papers*

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# JOURNALISM MONOGRAPHS

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Robert J. Goldstein, "Freedom of the Press in Europe" (2/23/81).

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Karen K. List, "William Cobbett and Philadelphia's Party Press, 1794-1799" (7/2/81).

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Dean W. O'Brien, "The News as Environment" (1/15/82).

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BRUCE M. SWAIN

*The Progressive, the Bomb and the Papers*

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ALTHOUGH never fully adjudicated, *U.S. v. The Progressive* is something of a landmark case: the first instance of injunction against publication of a magazine article and the first to involve that specter of our times, nuclear war.

Partly because of the reportage and commentary it provoked, the *Progressive* case is likely to be remembered for having raised in its starkest form the question: Should publication of secrets relating to the construction of atomic weapons be prohibited, even in a society affording freedom of the press? Such a likelihood is ironic, for the government dropped its effort to block publication under circumstances which made it clear that publication of the enjoined article would hardly divulge "secrets" not already readily available to the public. *The Progressive's* editors had argued as much for months, with mixed results.

Early on, however, the situation was anything but clear. The case first reached public attention on the night of March 8, 1979, when the Justice Department issued a press release in Washington to announce that the government had filed suit in federal court in Madison, Wisconsin, that day to prevent *The Progressive* from publishing an article intitled, "How a Hydrogen Bomb Works." The press release said the government was charging in its suit that the article, written by one Howard Morland, contained "secret restricted data." If the magazine published those data, the government asserted, it would "violate the Atomic Energy Act, help other nations develop thermonuclear weaponry, and injure the United States." Publication of the "secret restricted information," the release added, would "increase the proliferation of nuclear weapons and severely undercut the arms control and disarmament policies of the United States." The latter assertion was elaborated upon in a subsequent sentence: "The application further alleges, based on

affidavits filed with the suit, that the information could provide other nations with thermonuclear capabilities in the near future, thus jeopardizing the security of the United States as well as international security."

How had the government learned the contents of an unpublished manuscript? The release stated: "The magazine mailed a copy of the article to the Energy Department, asking that the Department review it and verify its technical accuracy." That department is the agency responsible for the "design and development of the nation's nuclear and thermonuclear weapons and for preserving the secrecy of sensitive nuclear weapons data," the release added. Named as defendants in the suit, according to the release, were: The Progressive, Inc., of Madison, the firm that publishes the magazine; Erwin Knoll, the editor; Samuel H. Day, associate editor, and Howard Morland. The release also stated that unless an injunction were issued by a federal court, publication of the article was "imminent."<sup>1</sup>

The press release, then, implied that a 40,000-circulation monthly magazine was apparently poised on the brink of publishing secrets about the manufacture of hydrogen bombs, having evaded the entire security establishment of the United States, and the government was invoking the power extended to it in such circumstances by the Atomic Energy Act of 1954. That power was sweeping: "The term 'Restricted Data' means all data concerning: 1) design, manufacture, or utilization of atomic weapons; 2) the production of special nuclear material; or 3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category . . . ."<sup>2</sup>

It was a law passed the year after Julius and Ethel Rosenberg were executed for disclosing atomic secrets to the Soviet Union.<sup>3</sup> Although conviction no longer carried the death penalty, the Act provided for sentences of up to 20 years for convicted violators, and, by implication, for the seizure of entire printings of offending publications.<sup>4</sup> In addition, the language of the law did not make it necessary for the government to prove that *The Progressive* had unlawfully obtained government information; under the Atomic Energy Act *all* information pertaining to nuclear weapons or nuclear energy is automatically classified. Even information that is the product of entirely private cogitation—government lawyers were to argue before Judge Robert Warren—is "data restricted at

birth."<sup>5</sup> Such statutory language would seem to fly in the face of First Amendment guarantees of press freedom, but its constitutionality had stood unchallenged for 25 years—a situation which, press critic Nat Hentoff has suggested, endured by virtue of a silent pact between media and government.<sup>6</sup> If the press had been reticent about confronting the secrecy empowered by the Act, government officials had not been at all reticent about reminding journalists of its scope. As Department of Energy information officer Jim Cannon told Day in the first stages of the case: "I had a network correspondent in here the other day and he began asking some questions. But when I told him about the Atomic Energy Act, he backed off right away."<sup>7</sup>

The *Progressive* editors would argue—in court, press conferences, interviews, the pages of their publications and op-ed pages of newspapers—that much was in error in the March 8 Justice Department press release: the title of the article in question, its contents, their reason for planning to publish it and the manner in which it had reached security officials. But one error became evident immediately. Government lawyers had *not* that day filed a suit against the magazine in U.S. District Court in Madison. The Washington press office had jumped the gun on its attorneys, who were forced to find another federal judge when Judge James Doyle of Madison disqualified himself because of personal ties with some members of the *Progressive's* board of directors.<sup>8</sup>

The Justice Department lawyers found their way to the Milwaukee federal courtroom of Judge Robert W. Warren. On the afternoon of March 9 he heard brief oral arguments concerning the department's request for a temporary restraining order. In that hearing, Deputy Assistant Attorney General Thomas Martin went directly to the heart of the government's case: It was in court to exercise authority explicitly granted by Congress under "an extraordinary statute designed to address an extraordinary category of information," which in this case concerned "the design and manufacture of atomic weapons." He also disclosed that the article had been the subject of ongoing discussions between the Department of Energy and the magazine, in hopes that an agreement could be reached to "recast the article to ensure that no restricted data would be published." Martin reviewed for the court affidavits from government officials who declared that publication of the article

would be injurious to national security and lead to the proliferation of nuclear weapons. He reminded the judge that in the Pentagon Papers case the Supreme Court had asserted that no one would deny that a restraint could be issued against publication of information concerning the movement of troop ships in time of war. The information under discussion, he argued, made the troop ship example pale by comparison.<sup>9</sup>

*Progressive* attorney Earl Munson countered by noting that the government had made no allegation that either the author or the magazine had examined classified documents. He argued that under the "vague and indefinite" statute the government was relying upon, even the thoughts of a college physics student on the subject were restricted from their conception until declassified by the government.<sup>10</sup>

In response to questions from Judge Warren, the magazine's attorney laid out the *Progressive* defense. The major issues in the case was secrecy in government and its abuse, Munson argued: "We must not as a people of this country be dependent upon government officials to determine what information is or is not discussible in this democracy."<sup>11</sup> The article was the product of one man's mind without recourse to classified material, and if a "mere journalist" with as little scientific training as Morland had received could arrive at such a product, then the "secrets" the government was acting to protect were actually not secret at all, he contended.<sup>12</sup>

Judge Warren was not impressed. "Is that a responsible way to test that principle?" he asked. Then he made a statement that was to inspire editorial page cartoonists for months: "It's like I'd want to think a long hard time before I gave the hydrogen bomb to Idi Amin. It seems to me that's just what we are doing."<sup>13</sup> Nor was he persuaded by *The Progressive's* lawyer's assertion that the affidavits supporting restraint of publication were no more compelling than those submitted by the government in the Pentagon Papers case. The judge said: "I can't help feeling that somehow or other to put together the recipe for a do-it-yourself hydrogen bomb is somewhat different than revealing that certain members of our military establishment have very poor ideas how to conduct a national effort in Vietnam, or how to classify government efforts in that regard." The judge noted for the record that he recognized that "any prior restraint of publication comes into any federal court with a very heavy presumption against its validity."<sup>14</sup>

The judge soon followed that declaration with a statement demonstrating that he accepted, at least for the time being, the Justice Department lawyers' view of the seriousness of the situation: "You can't speak freely when you are dead . . . I think back as a World War II soldier to what would have happened to me and all my colleagues and probably all of us if the V-2 had been developed just a little bit faster than it was, and I question very much whether anybody is entitled to express their freedom of speech at the expense of my liberty or my life."<sup>15</sup> He issued an order restraining publication of the article for ten days and set March 16 as the date for a hearing concerning a preliminary injunction.<sup>16</sup>

The editors began their campaign for public support after the hearing with an impromptu news conference on the courthouse steps, followed by a more formal gathering later that day at their Madison offices.<sup>17</sup>

Constraints upon the *Progressive's* lawyers in their preparation of arguments against the preliminary injunction requested by the government were unusual, to say the least. They had to be given clearances in order to examine the government's classified filings with the court. Those clearances did not arrive promptly, so Judge Warren granted a postponement until March 26.<sup>18</sup>

On March 16 the American Civil Liberties Union filed with Judge Warren an *amicus curiae* brief suggesting that he name a panel of independent scientists to test the government's claim that the *Progressive* article would cause irreparable harm to national security.<sup>19</sup>

At the March 26 hearing Judge Warren turned down the ACLU suggestion as being unlikely to furnish any information not available in affidavits from scientists already filed by both sides.<sup>20</sup> But he did offer to allow a mediation panel to enter the case—one constituted along the lines suggested in an *amicus* brief by the Federation of American Scientists: the government and the magazine would each nominate two senior media representatives and two senior weapon scientists, from whom Judge Warren would select two in each category. The group would be presided over by a lawyer or retired judge of his choosing. Otherwise, he would "regretfully" issue the preliminary injunction requested by the government.<sup>21</sup>

After a 90-minute recess the magazine rejected the panel proposal. Attorney Munson told the judge, "The editors believe they cannot compromise their First Amendment position."<sup>22</sup> In a press

conference afterward, Knoll said the magazine was not willing to aid the government in "enshrining secrecy by publishing a truncated article." To allow First Amendment rights to be determined by mediators, he said, would be "a frightening thing."<sup>23</sup>

The injunction Judge Warren then issued prohibited the defendants from publishing the article and from communicating any information the Secretary of Energy had designated as restricted. It also ordered the magazine to attempt to retrieve every copy of the article circulated to scientists for review purposes, with an initial accounting *in camera* in five days and another in ten.<sup>24</sup>

The judge's memorandum of March 26 made it clear that he was, by that point, far less amenable to the government lawyers' arguments than he had been when they sought him out on the night of March 8: "Does the article provide a 'do-it-yourself' guide for the hydrogen bomb? Probably not. A number of affidavits make quite clear that a *sine qua non* to thermonuclear capability is a large, sophisticated industrial capability coupled with a coterie of imaginative, resourceful scientists and technicians." But, he added, the article "could possibly provide sufficient information" to allow a "medium size nation" to develop a hydrogen bomb more quickly than it might otherwise. The case at hand, he noted, was different from the Pentagon Papers case in that: 1) the material involved was not historical in nature, 2) the effect upon national security was not merely a matter of embarrassment, 3) the Atomic Energy Act came into play in this case, with its prohibition of disclosure of data if there is reason to believe the disclosure will result in injury to the United States or advantage to a foreign nation.<sup>25</sup>

Finally, Judge Warren reasoned, the matter boiled down to a "disparity of risk":

A mistake in ruling against The Progressive will seriously infringe upon cherished First Amendment rights. If a preliminary injunction is issued, it will constitute the first instance of prior restraint against a publication in this fashion in the history of this country . . . . A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot.<sup>26</sup>

In his decision to rule against the magazine, the judge stated, he had been particularly influenced by the affidavits filed by government scientists:

Dr. Hans A. Bethe . . . states that sizeable portions of the Morland text should be classified as restricted data because the processes outlined in the manuscript describe the essential design and operation of thermonuclear weapons. He later

concludes "that the design and operational concepts described in the manuscript are not expressed or revealed in the public literature nor do I believe they are known to scientists not associated with the government weapons programs."<sup>27</sup>

The filing of those and other affidavits constituted a curious sub-plot in the drama surrounding the case. When Morland submitted his affidavits concerning the manner in which he had compiled information in the article, he included a two-and-one-half-inch-thick appendix consisting of published material. On the grounds that they constituted restricted data, the government suppressed four previously published items in the appendix, made 33 deletions in the attached affidavit and suppressed the entire four pages of a second affidavit relating to the writer's sources. "I have been told that the United States Attorney objects to the word 'censorship,'" Knoll told an interviewer at the time. "I don't care if the government calls it banana cream pie, it's still censorship."<sup>28</sup>

In addition, several of the affidavits from scientists obtained by the magazine in support of its contention that the Morland article did not contain classified data were either suppressed by the government and entered in the court's secret file or deleted in part. Those included statements from Theodore Postol, a physicist at the Argonne National Laboratory and physicists Ray Kidder and Hugh DeWitt of the Lawrence Livermore Laboratory.<sup>29</sup>

The affidavits had been obtained under remarkable circumstances. In order to review a copy of the manuscript in question, a scientist had to receive a special clearance from the government. And Day, a former editor of the *Bulletin of the Atomic Scientists*, learned with "utter disbelief" that many of his long-term colleagues wished to have no part in *The Progressive's* battle. There was, for instance, a telegram from Jeremy Stone, director of the Federation of American Scientists, shortly after the story broke:

Your effort to publish an article whose draft title was "How a Hydrogen Bomb Works" is not in the interest of nonproliferation, but quite the reverse. And your effort to invite and even induce a temporary restraining order on publication is not in the interest of freedom of the press but quite the reverse again . . .<sup>30</sup>

Even among scientists who advocated greater arms control, the magazine received a less than enthusiastic response: "I am already cleared for top secret. I don't see how I can properly read the article without running the risk of revealing secrets myself." Or, "As a matter of principle I will not submit to security clearance." Day flew immediately to California to locate more cooperative allies—many

of them suggested by Berkeley physicist Charles Schwartz. In some cases he found them willing to review the article, but that was before government security clearance had reached them. In other cases, scientific volunteers decided, upon reconsideration, not to submit to the security clearance required. In the most complex instance, one scientist remarked loudly within earshot of security officials that his affidavit contained classified information, thus setting into motion a legal struggle resolved only when yet another scientist with proper clearance agreed to hand-carry the affidavit, unread by the editor, to Judge Warren.<sup>31</sup>

Many of those affidavits directly contradicted the substance of government claims that Morland's article contained "secrets." One week before they obtained a temporary restraining order from Judge Warren, government lawyers had met with Day and the *The Progressive's* lawyers and discussed "those portions of the article which contained secret Restricted Data, the significance of that information, and the gravity of the harm that would flow from the release of such information." On March 9 the government lawyers presented the judge, *in camera*, an affidavit specifying exactly which information in the article the government felt to be restricted data.<sup>32</sup> Within a few days, however, they had agreed to reduce the restricted data allegedly contained in the article by 40 percent, thus inadvertently revealing the level of uncertainty inherent in the government's classification process.<sup>33</sup>

It was uncertainty about which data were classified, of course, that had brought the case to court, although the parties to the controversy related the sequence of events leading up to their appearance in Judge Warren's courtroom rather differently. According to the government's version of those events, detailed in its legal brief of March 9:

The Department of Energy recently received a copy of this article and, after reviewing its contents, determined that it contained Restricted Data as defined in the Atomic Energy Act . . . . In a meeting with defendants Day and Knoll on March 2, representatives from the Department of Energy offered to assist Day and Knoll in editing the "Article" to ensure that no secret Restricted Data was disclosed. Despite these notices and offers of assistance, defendants Day, Knoll, and *The Progressive, Inc.*, have made known their intention to publish the "Article" without deleting the portions of the article comprising Restricted Data.<sup>34</sup>

In the *Progressive* editors' version of events, the way government officials came to possess the Morland manuscript was far more complicated than the ". . . recently received . . ." above indicated.

And, according to them, it involved none of the voluntary submission to security measures that the Justice Department press release implied in its statement that *The Progressive* had mailed a copy of the article to the Energy Department, "asking that the Department review it and verify its technical accuracy."<sup>35</sup>

According to the account Knoll later provided in the pages of *The Progressive*, the pre-courtroom developments in the case took place as follows: Once they received Morland's article in January, the editors sent it to six "qualified experts" for review because the subject was not one in which any staff member was adequately knowledgeable. Without the consent of the magazine, one of the experts showed the manuscript to George Rathjens, an M.I.T. professor and government adviser. On February 15 Rathjens called the magazine, spoke to associate editor Day and expressed his belief that the article should not be published as written because it contained "secrets." On February 16 Rathjen's secretary called to inform Day that the Department of Energy was being sent a copy of the manuscript. The editors waited for an official reaction from Washington. Having received none, they contacted the magazine's legal counsel and board chairman, Gordon Sinykin. He laid out for them the power of government security official; under the terms of the Atomic Energy Act—including the possibility of government seizure of an entire issue of *The Progressive*. He advised the editors that it would be well to establish "whether the Department of Energy had any objection to publication" of the article. Knoll reports that he was "unhappy about the suggestion" since in his 30 years as a journalist he had never submitted work to government officials for scrutiny. So, five days after the call from Rathjens' secretary, the editors took what Knoll describes as a "half-way step." Assuming that if government officials found anything in the article "sensitive," it would be the sketches and accompanying captions, they mailed those to Washington. By February 26 the magazine was close to the deadline for its April issue, and there had still been no word from Washington. Day called Jim Cannon, the Energy Department official to whom the diagrams had been addressed, and was told that they had never been received. Cannon made no mention of the manuscript supposedly supplied the government earlier by Rathjens. Day then dispatched another copy of the diagrams and a copy of the manuscript to Cannon.<sup>36</sup> In an

effort to avoid the appearance of seeking "clearance" to print the article, Day included a cover letter—as he had in the case of the February 21 mailing—in which he asked for verification of technical information only.<sup>37</sup>

Day has acknowledged that Rathjens' decision to turn the manuscript over to security officials may have been prompted by an editor's note at the beginning of the circulated article: "The following report contains secret/restricted data." The note, Day has explained, was "a gimmick—just to really open it up." In handling the final draft of the article the editors had second thoughts about the "gimmick" and removed it.<sup>38</sup> Whether or not the editor's note influenced Rathjens, it impressed government lawyers, who quoted it when seeking a temporary restraining order from Judge Warren. Even without a note, a government lawyer reminded the judge, the manuscript began with these words: "What you are about to learn is a secret. A secret that the United States and four other nations, the makers of hydrogen weapons, have gone to extraordinary lengths to protect."<sup>39</sup> And Day's letter of February 26 to the Department of Energy, the lawyer told Judge Warren, began, "I enclose a second copy of some material entitled "How a Hydrogen Bomb Works" which has been submitted for publication in *The Progressive*."<sup>40</sup> According to Day, the "How a Hydrogen Bomb Works" was not a title, but a "slug line" accompanying the set of Morland diagrams he first mailed to Washington. That "slug line" was removed from the final draft of the article by the editors, he said.<sup>41</sup> Despite their later protestations that the article did not involve classified information, it would appear that the magazine editors did employ—in an early draft, at least—some sensationalizing "hype" that strengthened a spilled-secrets impression and perhaps helped precipitate legal action.

According to Knoll's later accounting, the *Progressive* editors had intended the Morland article to focus upon the problem of overweening governmental secrecy. And the title they chose, they thought, reflected that intent: "The H-Bomb Secret: How We Got It. Why We're Telling It." Knoll told readers:

It was our feeling . . . that the Government had invoked secrecy for thirty years to keep Americans from questioning the nuclear arms race. How much justification was there for the secrecy, we wondered, and what kind of information was being withheld that might help people formulate judgments on such vital questions as environmental risks, occupational health and safety threats, nuclear proliferation

and the continuing arms race, and the astronomical costs of the nuclear weapons program.<sup>42</sup>

Day began a series of articles about the nuclear weapons industry in the course of which he met freelancer Morland, a former Air Force pilot and anti-nuclear activist engaged in a similar project. Morland was commissioned to continue the research Day had begun.<sup>43</sup> As he confirmed in a letter to the magazine staff in July, his assignment was to: "raise the visibility of the nuclear warhead assembly line, which stretches in a great arc across America from Tampa, Florida, to Amarillo, Texas. Corporate connections should be explained. The bomb should be described in sufficient detail to allow readers to see nuclear warheads as pieces of hardware rather than as score-points in a contest . . . ."<sup>44</sup>

Although the article he eventually produced described the bomb in what government officials thought was overly-sufficient detail, the *Progressive* editors apparently never worried that it might be considered a how-to piece. "We knew the Morland's article could in no way be construed as a manual or guide for building a hydrogen bomb," Knoll wrote later.<sup>45</sup>

The preliminary injunction Judge Warren issued on March 26 was to stand unless overturned by the Seventh Circuit Court of Appeals. And the judge noted that the case would "undoubtedly" reach the Supreme Court because of the collision it involved between the First Amendment and national security concerns.<sup>46</sup>

Public debate escalated. Statements of support for the magazine came shortly from such traditionally anti-war organizations as War Resisters League, the American Friends Peace Committee, and the Committee for a Sane Nuclear Policy. And on March 30, *The Progressive* announced that a number of publications had signed the following statement: "We believe *The Progressive* is fighting to protect the First Amendment rights of every publication in America, including those with which we are associated." Signers included *Scientific American*, *Harper's*, *The Atlantic*, *The New Republic*, *Ms. Magazine*, *The Nation*, *The Columbia Journalism Review*, *Village Voice*, *Mother Jones*, *Inquiry*, *The New York Review of Books*, *Texas Observer* and *Politics Today*. Support also came quickly from Ralph Nader and former Attorney General Ramsey Clark.<sup>47</sup>

As is discussed below, editorial support from the nation's newspapers was far from unanimous. However, on April 4 the board of

directors of the American Society of Newspaper Editors voted 16-0 to join in the magazine's appeal of Judge Warren's order, stating that they were unable to assess the merits of publication because the government had imposed secrecy on relevant documents.<sup>48</sup>

On April 5 the American Civil Liberties Union announced that it would represent Knoll and Day in their appeal to the Seventh Circuit, because it considered the case to be "one of the most significant free-speech cases of the decade."<sup>49</sup> That decision was soon to result in developments that would radically change the complexion of the case. On May 11 Dimitri Rotow, an amateur nuclear weapons expert doing research for the ACLU lawyers, ran afoul of security officials at the Los Alamos Scientific Laboratory in New Mexico. His assignment was to search out all material on nuclear weapons that was available to the public, and his visit to the library began quietly enough. But after a lunch break he returned to discover that some of the material he had been examining was missing (an incident which could have left the government open to charges of interfering with the defendants' preparation for trial). There followed questions from a security official, then an abrupt closing of the library, which was normally open to the public, for "inventory and review." A library spokesman announced that some materials examined by Rotow had been found to include an "improperly unclassified document." The magazine editors promptly issued a statement saying that the library closure "further illustrates the point The Progressive is making: that information classification is used to intimidate American citizens more than to preserve genuine secrets."<sup>50</sup>

By April 16, Duane C. Sewell, assistant secretary of energy for defense programs, was forced to admit that the 1975 declassification of the Los Alamos report had been "a serious error." The *Washington Star*, which reported that it had obtained copies, said that the report provided the weight, size, configuration, placement, and nuclear yield of devices used by the Atomic Energy Commission in secret hydrogen bomb testing in the 1950s. The newspaper was immediately notified by government lawyers that reprinting of the document would amount to a violation of the Atomic Energy Act. The *Star* turned over its copy to Sen. John Glenn, chairman of the Subcommittee on Energy, Nuclear Proliferation and Federal Services, who announced that he would re-open an investigation of

classification policies.<sup>51</sup> On May 18 the Chicago *Sun-Times* reported it had received a copy of the same document through the mail.<sup>52</sup>

The ACLU seized the opportunity to translate the government's embarrassment into a courtroom advantage for *The Progressive*. On May 22 it publicly identified 42 documents relating to nuclear weapons that were available to the public at the Los Alamos laboratory. The ACLU said the documents identified would be even more helpful to a nation wishing to build a thermonuclear weapon than the document involved in the closing of the library during Rotow's visit. The mistakenly declassified papers would be very useful to a foreign power in building a hydrogen bomb, while the *Progressive* article would not, the ACLU argued.<sup>53</sup> On May 31 Judge Warren agreed to hold a hearing on June 12 to consider a motion by the ACLU to lift the injunction against the magazine in view of the Los Alamos developments.<sup>54</sup>

The events at Los Alamos and the government admission of the declassification error were not the first indications that nuclear secrets might not be altogether secure, nor was the Morland article. Rotow, himself a long-time critic of the laxity of classification procedures, had the year before provoked what the Energy Department referred to as a "thorough" re-examination of the Los Alamos library stacks after he emerged with the plans for the TX-7, a nuclear warhead used on early missiles. The Harvard then-undergraduate also produced in 1978 a detailed plan for an atomic bomb, using materials from the public shelves of the Library of Congress. After two former AEC bomb designers told Sen. Glenn's subcommittee that Rotow's work was the most sophisticated explanation of an A-Bomb they had seen in unclassified literature, the 400-page report was classified.<sup>55</sup>

"It may be that the biggest secret about the hydrogen bomb is that there is no secret," Sen. Charles Percy told Sen. Glenn's subcommittee in late May, sounding almost an echo of the *Progressive* editors' refrain.<sup>56</sup> By June 8 the Los Angeles *Times* reported that the Los Alamos disclosures so undercut the government's case that most Justice Department lawyers assigned to the *Progressive* case favored abandoning the effort.<sup>57</sup> On the same day, the Justice Department made its most damning admission to date. It submitted a stipulation telling Judge Warren that the 1975 declassification of

the Los Alamos document had revealed "the essential secret of the H-Bomb." The department also admitted that any competent scientist who had read the previous document would receive "no significant additional information or benefit" from the enjoined *Progressive* article.<sup>58</sup> Still, a Justice Department spokesman declared that the case would not be dropped: "The position that we originally took was the correct one and we intend to maintain it," he said.<sup>59</sup>

After a two-hour closed hearing in his chambers on June 12, Judge Warren reserved his decision for three days. When, on June 15, he denied the motion to vacate the preliminary injunction,<sup>60</sup> he took the unusual step of sealing his written opinion—his explanation of how he had reached his decision—from public scrutiny, a step which Day promptly deplored as evidence of "the spreading of the cancer of secrecy into the American judicial system."<sup>61</sup> The opinion was eventually released by Warren on February 8, 1980.<sup>62</sup>

On June 13 the *Daily Californian*, campus newspaper at the University of California at Berkeley, published a letter from Argonne National Laboratory scientists Alex DeVolpi, Gerald Marsh, George Sanford and Theodore Postol to the Department of Energy criticizing the classification system that had resulted in what they considered to be serious breaches of security. The letter, the Department of Energy advised the newspaper the same day, contained classified information the publication of which could constitute a violation of the Atomic Energy Act. The *Daily Californian* editors decided to defy the warning, as did those at the *Oakland Tribune* and the *San Jose Mercury*, who published excerpts from the letter.<sup>63</sup> According to Day, a copy of the letter had been sent to the papers by Charles Hansen of Mountain View, California, who was a computer programmer and yet another amateur expert on nuclear weapons. A month later, the Department of Energy classified the scientists' letter itself.<sup>64</sup>

On June 22, the magazine editors' lawyers asked the U.S. Supreme Court to speed up consideration of the case by the Seventh Circuit Court of Appeals, which had set a hearing date of September 10, when the new court term opened. The ACLU lawyers, citing the "special significance" of the prior restraint case, pressed for a hearing date in early July.<sup>65</sup> But in an unsigned opinion released on July 2 the Supreme Court turned down the request,

ruling that the editors had waited too long to seek expedited action. Dissents were filed by Justices Byron R. White and William J. Brennan, who said they felt the appeals court had unduly delayed consideration of the case.<sup>66</sup>

When the case reached the three-judge Seventh Circuit Court of Appeals in Chicago on September 10, government lawyers requested that the public be banned from all hearings. The court denied that motion, citing the Supreme Court's long tradition of hearing cases involving national security and trade secrets in open court. But the judges held open the possibility that some oral arguments might be heard in their chambers.<sup>67</sup> The government lawyers' argument to the court on September 13 bore strong resemblances to their first appearance before Judge Warren in March. Deputy Assistant Attorney General Thomas Martin contended that never before had a prior restraint case reached a court "with a more explicit direction from Congress."<sup>68</sup> The stage appeared set for a repetition of the courtroom battle already played out in Milwaukee.

But the proceedings in Chicago were soon to be overshadowed. On September 15 a new theater of operations opened in San Francisco, one that would in short order make the injunction academic. The Justice Department for the second time obtained a temporary restraining order to block publication of an article relating to the hydrogen bomb. Judge Robert H. Schnacke granted the restraining order to prevent the *Daily Californian* from publishing an August 27 letter from Hansen.<sup>69</sup> Again, government lawyers claimed that the material in question contained "secret, restricted data" which, if published, would "help other nations develop nuclear weaponry and injure the United States." Other publications were reported to have received a copy: the *Peninsula Times-Tribune* of Palo Alto, which printed a story about Hansen's charge on August 30, the *San Jose Mercury*, the *Oakland Tribune*, the *Wall Street Journal*, the *Progressive*, the *Madison Press Connection* and the *Milwaukee Sentinel*. The *Sentinel* reported that it had refused to surrender its copy to the Energy Department, but that it had no intention of publishing "any classified information from the letter."<sup>70</sup>

Government efforts to block publication of the letter, however, were short-lived. On September 16 the *Press Connection*, a 14,000-circulation daily in Madison founded by striking *Capital Times* and

*Wisconsin State Journal* employees, put out a special Sunday edition carrying the Hansen letter. On the front page were a diagram showing a cross-section of the hydrogen bomb and an editorial explaining that the paper had taken the step in protest against "government censorship."<sup>71</sup> On the same day the *Chicago Tribune* also informed the government that it would print "appropriate and informative portions" of the Hansen letter, in effect challenging the government to begin legal proceedings to stop it. The Tribune Company owned the Palo Alto newspaper which had received a copy of the letter.

The action of the small Madison paper took government officials by surprise. The deputy general counsel of the Department of Energy told reporters in Washington that the government had relied upon a list of seven publications thought to have received the Hansen letter, and the *Press Connection* was not on it. Six of these, he said, had given the government "reasonable assurances" that they would not publish the letter, and the seventh, the Berkeley paper, had been enjoined.<sup>72</sup>

The Hansen letter, as reproduced in the *Madison Press Connection*, was addressed to Sen. Charles Percy, who had earlier expressed concern over the effectiveness of existing classification procedures. "It is vital to understand that the Progressive case is a purely political issue, and that the technical information presented in the Morland article is not at all important, or any longer relevant to the larger issues," Hansen instructed the senator. The larger issue, he suggested, involved the ability of the government to maintain a monopoly in public discussion of nuclear policy. The technical information presented by Morland was not important, he suggested, because three senior government nuclear scientists had already told far more than the *Progressive* author—all without prosecution. He cited an *Encyclopedia Americana* article by Dr. Edward Teller of Stanford University and lengthy interviews given by Dr. Theodore Taylor of the Institute of Advanced Studies at Princeton University to John McPhee, author of a book explaining fission weapon particulars. That book, *The Curve of Binding Energy*, Hansen said, had been drawn upon by Rotow in his design of an atomic weapon in 1978 and by Princeton undergraduate John Phillips in his similar feat in 1977. In his brief history for the senator, Hansen drew upon other technical information that had escaped

censorship: an unsigned article in the March issue of *Fusion* magazine (which had not been prosecuted), an *amicus curiae* brief by the Fusion Energy Society that publishes *Fusion*, and a government affidavit filed in the case by weapons design consultant Jack Rosen-gren.<sup>73</sup>

The third case of apparent indiscretion on the part of a person with security clearance cited by Hansen was that of George Rathjens, of M.I.T., the man the *Progressive* editors felt had turned them in. According to affidavits filed in the case by Morland, Hansen noted, Rathjens had looked at a diagram of an H-bomb and told the author that he did not believe it would work, allowed Morland to use his office for a "brainstorming" session with other nuclear initiates, and identified a bomb component for the writer. Although his other charges of apparent violations had received rather evasive official responses, Hansen reported, Rathjens had threatened to sue him for libel and denied having given any information about weapons design to Morland.<sup>74</sup>

Hansen made no connection in his letter between Rathjens' alleged indiscretions in the presence of Morland and the role the M.I.T. professor had played in the history of the case as recounted by the magazine editors. But those allegations raise the possibility that Rathjens' actions may have been motivated by concern that he not become known as one of Morland's sources.

On September 17 the Justice Department announced that it would seek dismissal of its cases against both *The Progressive* and the Berkeley newspaper. The reason for the step, the agency announced, was "publication of an article containing restricted data concerning thermonuclear weapons information by a newspaper in Madison, Wisconsin."<sup>75</sup> The Morland article, once Judge Warren's order had been vacated by the appeals court on September 28,<sup>76</sup> was published in the November issue of the magazine, under—needless to say—the editors' version of its title. The magazine announced that it was published "exactly the way we intended to publish it last spring."<sup>77</sup>

But the case was not over. The September 17 announcement by the Justice Department also declared that the agency's criminal division would undertake an inquiry into the possibility that prosecution might be "appropriate" for violation of court orders or the Atomic Energy Act in the two cases.<sup>78</sup> And in asking the court to

dismiss the injunction against publication of the Morland article, the government also moved to have the appeals court dismiss the magazine's appeal as moot and remand to Judge Warren decisions concerning the disposition of *in camera* documents in the case, all of which the court agreed to on October 1.<sup>79</sup>

The motion to dismiss its appeal as moot had been vigorously opposed by *The Progressive*, which sought to have the appeals court rule on the constitutionality of the Atomic Energy Act provisions under which the government had originally brought suit. In an appeal submitted to the court on September 24, the magazine's lawyers warned against the dangers of leaving the question open:

This case clearly is capable of repetition both for these defendants and for others . . . . Yet it will continue to evade review until these defendants, another magazine, newspaper, or individual again forfeits—however temporarily—First Amendment rights to litigate the fundamental issues raised by the Atomic Energy Act and the injunctive relief the government and the district court believe it provides . . . . There are in the record of this case more than twenty-five publications and broadcasts that have stated one or more of the three concepts the government sought to protect in the context of thermonuclear weapons, yet the government sought no injunction nor brought a criminal action. Arbitrary decisions of the government to invoke the statute or not may never be reviewed if the government carefully chooses its cases.<sup>80</sup>

The October 1 decision by the appeals court noted that negotiations were underway between lawyers for each side concerning the documents still held *in camera*.<sup>81</sup> On December 28 Justice Department lawyers filed with Judge Warren a list of some 34 documents government officials no longer considered classified information. Accompanying the list was a request that Judge Warren delay making those documents public until agreement had been reached concerning the remaining *in camera* materials.<sup>82</sup> On February 8, 1980, those negotiations bore their first public fruit. Judge Warren released his previously secret opinion of June 15, citing "revised Department of Energy guidelines" under which the contents of that opinion were no longer considered official secrets as described by the Atomic Energy Act. The released June 15 opinion revealed what the judge had been attempting to protect. He had concluded that the concept he described as "radiation coupling" was still secret.<sup>83</sup>

On September 4, 1980, legal proceedings in the case finally came to an end with an agreement concerning the 72 documents still held secret by the court. Attorneys for the government, the magazine and Morland signed a stipulation providing for the release of 43 entire documents and portions of 29 others. To the last, *The Progressive*

asserted that it did not accept "the factual or legal basis" for the government's continuing to keep any of the documents sealed; the stipulation specified that the magazine was not relinquishing any right to continue seeking access to those documents through a Freedom of Information Act suit. The agreement allowed for disclosure of the substance—but not actual copies—of data that had once been classified or restricted, as long as the U.S. government was not identified as the source of the information. And Judge Warren's final order in the case provided that the government would review that previously classified material, now designated "sensitive," within five years and release any of it for which officials no longer deemed that characterization appropriate.<sup>84</sup> It was also announced in Judge Warren's courtroom that day that there would be no further prosecution under the Atomic Energy Act or for violation of any court orders in the case.<sup>85</sup>

Long before the case ended, another request for a preliminary injunction on the grounds of national security had been filed in a controversy involving nuclear energy—this time the production of electricity by a private utility.

On February 1, 1980, lawyers for the Metropolitan Edison Company sought a preliminary injunction against *The Guide*, a Harrisburg, Pa., weekly newspaper planning to publish an article critical of security precautions at the firm's crippled Three Mile Island plant. Information for the article had been gathered by a reporter working as a security guard at the plant. The paper should be restrained from publishing the article under provisions of the Atomic Energy Act, lawyers for the power company told Judge C. Dowling in Dauphin County Court.<sup>86</sup> Judge Dowling denied the request for an injunction three days later, and, in doing so, employed language heartening to those who might have feared the damage done First Amendment rights by the *Progressive* case:

Publication is many times inconvenient, disruptive, annoying, damaging, but the experience of our founding fathers, an experience which has been reinforced throughout history, suggests the view that the press must be left free to publish news, whatever the source, without censorship, injunction, or prior restraint. Without an informed and free press, there cannot be an enlightened citizenry to protect the values of democratic government.<sup>87</sup>

## PRESS COVERAGE

*Reportage*

From the time the story first broke on the night of March 8 reporters covering the *Progressive* case were forced to choose between two distinct versions of the title of Morland's article, its contents and the way in which it reached security officials.

First-day reports relied heavily upon the government version of events, perhaps because *Progressive* editors, feeling themselves bound by an agreement with government lawyers not to discuss the case, were evasive in their initial contacts with reporters. Still, some newspapers even in their first stories gave readers indications that the situation was not as clear-cut as the Justice Department press release implied. Second-day stories, following the editors' press conferences of March 9, reflected even more balance.<sup>88</sup>

*The Title.* The government version of the article title—"How a Hydrogen Bomb Works"—or paraphrases, continued to appear in news stories and columns, however.<sup>89</sup> In sharp contrast were the op-ed pieces submitted to various publications by *Progressive* editors. In the *Washington Post* of March 13 Knoll referred to "an article about the U.S. nuclear weapons program." Associate Editor John Buell called it an "article on hydrogen bomb secrecy" in the *Madison Press Connection* of March 15. Morland himself, curiously enough, referred to it in both a March 26 *New York Times* article and an April 4 *Newsweek* column by the attenuation, "The H-Bomb Secret."<sup>90</sup>

Other journalists seemed to become sensitive to the implications of the proffered title alternatives quickly. Austin Wehrwein of the Minneapolis *Star* editorial page staff on March 11 made a point of observing that the title was "... not 'How a Hydrogen Bomb Works,' as the Justice Department charged, thus alarming the country." *Washington Post* ombudsman Charles Seib on March 23 referred to "an article on the hydrogen bomb." One person who had particular reason to be sensitive to the importance of the title was Gerald Piel, publisher of *Scientific American*. He provided the *New York Times* a March 26 op-ed piece lamenting his decision to bow to government censorship in 1950, a step which had resulted in a "mutilated" article on nuclear weapons in that magazine.

Judge Warren's preliminary injunction of March 26 officially established the article title by the editors' version: "The H-Bomb

Secret: How We Got It, Why We're Telling It."<sup>91</sup> And some reporters and papers adopted that title immediately.<sup>92</sup> Others, such as Bob Specter of the *Los Angeles Times*, chose the abbreviated "The H-Bomb Secret."<sup>93</sup> James J. Kilpatrick, by April 9, had moved from his reference to "How a Hydrogen Bomb Works" of March 15 to simply "a major article on the hydrogen bomb."<sup>94</sup> Charles Leroux of the *Chicago Tribune* seemed to have swung entirely to the magazine editors' version of the article contents when, on April 2, he referred to "an article on secrecy surrounding hydrogen bomb production."<sup>95</sup>

The how-to image proved harder for the magazine editors to dispel, however, perhaps because the "Secret" in even their chosen title encouraged a how-to characterization by journalists. Associated Press stories of March 22 and March 23 referred to an "article on how to construct a hydrogen bomb"<sup>96</sup> and "an article on the operation of the hydrogen bomb."<sup>97</sup>

Some Associated Press stories that appeared after Judge Warren's March 26 injunction employed the editors' version of the title and referred to "an article about the hydrogen bomb business"<sup>98</sup> or even "a controversial H-Bomb article."<sup>99</sup> But there appeared to be no consistent A.P. policy on the title. When the Morland article surfaced in Australia early in April, a story from combined wire services in the *Chicago Tribune* referred to it as an article on the "workings of the hydrogen bomb."<sup>100</sup> At the *New York Times*, on the other hand, there obviously evolved a policy of referring to "an article about the hydrogen bomb."<sup>101</sup> Even that policy, however, was not always enforced. On the day the preliminary injunction was issued, an article by science writer Walter Sullivan, outlining the reactions of experts who had seen the Morland article, referred to "an article submitted to the *Progressive* that tells in some detail how to make one (hydrogen bomb)."<sup>102</sup> An op-ed piece by retired security official W. Donald Stewart in the *Washington Star* on April 21 entitled "How Pentagon Secrets Find Their Way into Print" called it "an article on how to make hydrogen bombs."

Other writers, however, conveyed the *Progressive* editors' denials of the how-to charges. "We don't have a story that tells people how to build an H-bomb. That would be a pretty crazy thing for us to do," Lawrence Ingrassia of the *Wall Street Journal* quoted Knoll as

saying on March 30.<sup>103</sup> Douglas Kneeland of the *New York Times* quoted him on March 18 saying, "We don't think it's a do-it-yourself, built-your-own hydrogen bomb kit. This is the Progressive, not Popular Mechanics."<sup>104</sup> And Deidre Carmody's April 30 *New York Times* account of Knoll's appearance before the American Society of Newspaper Editors emphasized his argument that the article was centered on secrecy, not secrets of construction.<sup>105</sup>

*How Obtained.* On the issue of how government officials had obtained the Morland article, some perceptive reporting began to emerge almost immediately after the temporary restraining order was issued. On March 11 the *Washington Post* story by Walter Pincus enlarged upon the hints in his account of the previous day and spelled out completely Knoll's view of the role Rathjens had played in the proceedings.<sup>106</sup> A March 12 article by David Prichard of the *Madison Capital Times* conveyed the editors' explanation that Rathjens' act had forced their hand and led to the submission of the article.<sup>107</sup> Kneeland of the *New York Times* on March 18 included the quote, "We don't routinely submit things to the government, and we didn't routinely submit this article," then gave the editors' version of events.<sup>108</sup> But the March 26 article by Sullivan in the *New York Times* omitted at least one step of the editors' version of the way in which Rathjens came to see the manuscript: "Mr. Morland was aided in part by specialists at the Massachusetts Institute of Technology, at least some of whom were alarmed when they saw his manuscript. One wrote the *Progressive* urging that the article should not be published, at least in its present form."<sup>109</sup> Leroux of the *Chicago Tribune* on April 2 spelled out the submission chronology and pointed out Rathjens' position as an adviser to the State Department on non-proliferation of nuclear weapons.<sup>110</sup>

The Pincus article in the March 11 *Washington Post* also provided readers with valuable insight into the negotiations between the magazine and the government that had gone on before the government requested a restraining order. That story included information that suggested government lawyers may have reacted out of fear that publication of the Morland article was more imminent than it actually was. The magazine had already sent its next issues to press—without the Morland article—by the time Justice Department lawyers approached Judge Warren, Pincus reported. He also noted that *Progressive* board chairman and counsel Gor-

don Sinykin had informed government negotiators on March 7 that the magazine would "proceed with publication" unless the government took legal action to block it.<sup>111</sup>

*The Proliferation Issue.* Of all the issues in the controversy, the government's claim that publication would increase the proliferation of nuclear weapons received the closest scrutiny by newspaper reporters. As early as his March 10 *Washington Post* analysis, Morton Mintz referred to that charge as "a government claim—disputed by the Progressive."<sup>112</sup> On March 11 Robert Pear and John Fialka of the *Washington Star* pointed out that detonation of a hydrogen bomb requires the availability of an atomic bomb as a trigger and quoted one expert as saying, "This is not something you can build in you garage, at least not yet."<sup>113</sup> Dan Greenberg, *Washington Post* science writer, had as his major point in a March 13 op-ed piece the assertion that the only "secret" of the hydrogen bomb was revealed at Hiroshima: it is possible to explode one. A March 20 article in the *Milwaukee Journal* by Walter Fee quoted *Progressive* lawyer Earl Munson contending that if someone of Morland's meager scientific training could produce the article he had, then there was no secret.<sup>114</sup> On March 21, Kneeland pointed out in the *New York Times* that information censored in some of the scientists' affidavits by the government had already been published elsewhere.<sup>115</sup> Fee's March 25 *Milwaukee Journal* story centered on the editors' argument that no secrets were involved in the Morland article and cited Albert Einstein's remark, "There is no secret, and there is no defense."<sup>116</sup>

On April 30 the *Milwaukee Sentinel* ran the first of two lengthy feature articles entitled "Secrets are Few," in which the public availability of much technical information concerning the hydrogen bomb was reviewed.<sup>117</sup> That article, by reporter Joe Manning—who, like Morland, lacked extensive training in science—seems to have been a factor in the decision-making of at least one Appeals Court judge, who referred to it during oral argument before the court on September 13.<sup>118</sup> If so, the effect upon the judge seems to have been opposite to that of editorials less than supportive of *The Progressive* to which Judge Warren had referred before issuing the preliminary injunction of March 26: "Many elements of the press see grave risk of permanent damage to First Amendment freedoms if this case goes forward."<sup>119</sup>

News accounts of the government's decision in September to drop its efforts to bar publication of the Morland article demonstrated that the magazine editors' version of the title and the content of the article had still not been accepted by all of their fellow journalists. The *New York Times*<sup>120</sup> and *Washington Post*<sup>121</sup> stories on the September 17 Justice Department announcement referred to an article "on" or "about" the hydrogen bomb. But the *Wall Street Journal* story's first paragraph referred to the dropping of efforts to block "publication of hydrogen bomb secrets."<sup>122</sup> And the United Press International account referred to the dropping of efforts to block "printing secrets to the hydrogen bomb."<sup>123</sup>

### *Editorial reaction*

Examined here are the editorial positions taken during three stages of the case by 14 daily newspapers chosen by the author as opinion leaders: the *New York Times*, *Washington Post*, *Washington Star*, *Boston Globe*, *Providence Journal*, *Chicago Tribune*, *Milwaukee Journal*, *Minneapolis Tribune*, *St. Louis Post-Dispatch*, *Louisville Courier-Journal*, *Des Moines Register*, *Miami Herald*, *Los Angeles Times*, and *Christian Science Monitor*.

The first volley of editorials followed the temporary restraining order issued by Judge Warren on March 10. The *New York Times* and the *Washington Post* were the first to editorialize, on March 11. Like many of the other papers that took a wait-and-see attitude in that first week, the *Times* confessed feeling "a touch of sympathy" for Judge Warren and his obligation to deal with a "devilish" problem. The *Chicago Tribune* on March 13 followed suit, stating that because of the "epic implications of the suit" the judge had little choice but to issue the temporary restraining order while he sifted through the evidence. The *Times* editorial concluded, "Under the circumstances, a week or two of enforced restraint for a monthly journal seems a tolerable price" for careful consideration by the judge. That conclusion seemed to reflect "a certain snobbishness" which *Washington Post* ombudsman Charles Seib would later dissect. It was, he said, "... as if the big-time daily newspaper editors were asking, 'What is this obscure little magazine doing, using our press freedom?'"<sup>124</sup>

Joining the *Times* and the *Tribune* in a wait-and-see posture were the *Miami Herald*,<sup>125</sup> the *Milwaukee Journal*,<sup>126</sup> and the *Louisville*

*Courier-Journal*.<sup>127</sup> All five were quick to warn their readers of the possible consequences of the case for traditional press freedoms: a precedent might be set that would further erode First Amendment protections. The problem involved was devilish, the *New York Times* said, because "we believe that Americans must be free to publish anything—except perhaps something like the design of a highly dangerous weapon." All but the *Herald* pointed out that the burden of proof in the case rested squarely with the government. The *Times* reminded readers of claims, ultimately unsubstantiated, that the government had made about the effects of public disclosure in the Pentagon Papers case. "It is that claim by Government that is on trial, not the wisdom, maturity, or patriotism of the article," the paper said. The *Louisville Courier-Journal* also raised the Pentagon Papers precedent, and argued that *The Progressive's* case was weakened by a major difference between the two cases: the applicability of the Atomic Energy Act to the Morland article. The *Milwaukee Journal*, stressing that the legal standard the government must satisfy in order to justify prior restraint was one of direct, immediate and irreparable damage to the nation as a consequence of publication, told readers that it would not be enough to demonstrate that the article violated provisions of the Atomic Energy Act against publication of information classified as secret. "That restriction may be so sweeping as to be unconstitutional," the paper added. The *Chicago Tribune* also urged the courts to be skeptical of the government's arguments, but added: "They need not stretch freedom to the point of suicide."

The *Courier-Journal* pointed out the magazine's claims that none of Morland's information was gathered from classified sources, and that "one alleged purpose" of the article was to show how available such information was. It added:

That's a legitimate journalistic goal. But both Justice and Energy Department lawyers contend that the article contains secret material. Admittedly, as a newly released congressional study observes, the government is still too prone to stamp "Secret" on any document that remotely relates to national security. But if ever secrecy were justified, it's in the case of information that would lead to more widespread production of the most destructive weapons mankind has ever produced.

Still, the *Courier-Journal* admitted that it was not altogether clear that the magazine had the secret information the government claimed it had, a theme also found in the *New York Times* and the

Chicago *Tribune* editorials. The *Times*, the only paper to emphasize in its first editorial the dispute between government lawyers and the magazine editors about the exact title of the article, concluded: "So we do not know the critical fact: What does the article actually contain?" According to the *Tribune*, very few people knew the answer to that question. "Is it a vague, layman's treatment of the general conceptual background of nuclear weaponry? Or is it a precise, detailed technological description of the methods by which an H-bomb can be constructed?"

Only one of the papers taking a middle-of-the-road posture in its first editorial on the matter raised the issue of how government officials had obtained the article. The Miami *Herald*, while calling the temporary restraining order "disturbing," added: "And yet, the *Progressive* almost invited prior restraint by thrice notifying the Government that the H-bomb article was about to be published. In fact, the editors sent Federal officials material about the article." Some cynics, the paper noted, were suggesting that the editors of the "financially troubled" magazine had been motivated largely by their desire for publicity.

Three papers immediately took the side of *The Progressive*. "Muzzling a Magazine" was the title of the March 15 Des Moines *Register* editorial. Judge Warren's temporary restraining order was "understandable, in a way" because of the terrifying prospect of nuclear proliferation, the paper said. "But the lawsuit that produced it is based upon arguments and suppositions that are wafer-thin." Citing *The Progressive's* claim that Morland had not had access to classified documents, the *Register* concluded: "Thus the government is attempting to retrieve what it has already disclosed." And, it stated categorically that "Morland's article is not a 'how to' piece. It is an article about government secrecy." It instructed readers that "The Atomic Energy Act was enacted in an era when people were seeing Communist spies under their beds," and called the "classified-at-birth" language of the law "probably unconstitutional." Forcing an editor to hold up publication of an article, the *Register* said, "is a tactic associated with police states."

The Minneapolis *Tribune*, in a March 24 editorial entitled "How Censorship Works," instructed readers on the "narrowly defined extraordinary circumstances" that might require "a cautious cur-

tailment" of freedom of the press. "But no such circumstances have been shown so far in this case," it concluded.

The March 13 editorial in the St. Louis *Post-Dispatch* was concerned primarily with the potential consequences of the case for the First Amendment: "What could distinguish the case of *The Progressive* from earlier ones is that the government here may succeed for the first time in exerting permanent prior restraint on the publication of a magazine article," thanks to fears over the "horrendous power" of the hydrogen bomb. That collision between the bomb and the First Amendment, the paper concluded, necessitated "a careful hearing, with the benefit of any doubt being given to free speech and a free press."

Four newspapers took the government's side in their first editorials on the matter. All four questioned the wisdom of *The Progressive's* intention to publish the article in the first place. The Boston *Globe* March 13 editorial, entitled, "The Progressive Backslides," began with the observation that countless law school professors had used just such a hypothetical case in discussing the First Amendment. The legal fight, the *Globe* said, was only part of the battle. The other half of the struggle would take place in the public domain, where the magazine would be forced to "demonstrate, more convincingly than it has, what purpose would be served by printing . . ." The Los Angeles *Times* of March 13 found it "difficult to understand the rationale" of the magazine editors since it thought the same points about governmental secrecy could be made without such an article. The March 11 Washington *Post* editorial agreed: "There is not exactly a large public interest to be served—or even a small one—in making available to all information on how to build nuclear weapons." The March 13 Washington *Star* editorial took the same position: "Even if the project were not against the law, and clearly it is, the *Progressive's* ambition would remain a mystery."

The four papers supporting the government at that point joined the middle-of-the-road papers in suggesting that only damage to the First Amendment could stem from the case. The Washington *Post* editorial, entitled "John Mitchell's Dream Case," said: "As a press-versus-government First Amendment contest, this, as far as we can tell, is John Mitchell's dream case—the one the Nixon Administration was never lucky enough to get: a real First Amendment loser." It was the "worst possible test case," the *Post* said, and the maga-

zine would do friends of the First Amendment a great service by dropping it. The Los Angeles *Times*, for the same reason, called it the "wrong issue at the wrong time in the wrong place."

The magazine's claim that Morland had not used classified data did not sway the *Star*: "The fact that Mr. Morland culled his information from 'public' sources, moreover, doesn't mean that the engineering of hydrogen bombs is in the public domain. The sum of the parts is immediately more important, more sensitive, than the parts themselves." The *Star's* was the only unequivocal endorsement the classified-from-birth argument the government was to receive in the first wave of editorials on the case.

At that stage in the history of the case, then, the "scorecard" of editorial positions among the 14 papers studied read: pro-*Progressive*, 3; pro-government, 4; middle ground, 5; undeclared, 2 (*Providence Journal* and *Christian Science Monitor*).

The first alteration in that alignment came within two weeks of the temporary restraining order. Having given the matter due consideration, the New York *Times* on March 23 moved squarely into the pro-*Progressive* camp with an editorial entitled, "Public Bombs, and Minds Born Secret." The Carter Administration's case, the *Times* concluded, "... turns out to be lame in both logic and law. The shouts of alarm are more harmful than the danger they describe." Calling the case against *The Progressive* "a case against the national interest—against free speech and free inquiry," the paper took aim at the "born secret" argument of the Justice Department:

By this sweeping doctrine, the Government also suppressed parts of Mr. Morland's account to the court of where and how he gathered every significant statement and drawing in his article. We suppose that if he were now offered a fellowship to pursue his open inquiry in Canada or Uganda, he himself would have to be pronounced as "born classified" and forbidden to use his reasoning powers. That the Government thinks all such thought and creative work will be conveniently "born" within the jurisdiction of the United States and that it can find and suppress every such talent is patently absurd.

The second volley of editorials followed the preliminary injunction issued against the magazine on March 26. The pro-magazine New York *Times* became more stern in tone. Judge Warren's decision, it said on March 29, was "not only unconstitutional but also unnecessary, arbitrary, and ill-informed." In its March 29 editorial, "Censors at Work," the paper countered the judge's assertion that the article might possibly allow a foreign power to avoid some scientific blind alleys. What kept the H-bomb club small, the *Times*

argued, was economic and political pressures, not technological frustration.

On April 4, the pro-*Progressive* ranks were increased by another convert. The Chicago *Tribune*, relinquishing its earlier middle-of-the-road position, declared that the judge's introduction of "novel concepts in the literature of censorship" had "alarming implications of thought control." The *Tribune* was particularly concerned about the "need to know" standard that Warren seemed to be establishing: "Such a standard could result in the most oppressive kind of censorship by investing some authority, probably government, with power to make this determination."

Like the post-injunction editorials of the *Times* and the *Tribune*, the March 28 editorials of the pro-magazine St. Louis *Post-Dispatch* and Des Moines *Register* stressed the magazine's argument that Morland had used no classified information in writing the article. The *Register* decried Warren's "attempt to pass the buck" by suggesting a mediation panel.

Concern for the fate of the First Amendment was the common thread of editorials by papers that adopted or retained a middle-of-the-road stance after the March 26 preliminary injunction. The formerly pro-government Washington *Post* joined those ranks on March 28 and found itself agreeing with the New York *Times* that security officials were overreacting so badly as to make the magazine's point for it. While the pro-magazine Chicago *Tribune* had criticized the *Progressive* editors for not publishing the article without any consultation with the government, the *Post*, although admitting that it was "almost inevitable" that Judge Warren had restrained the magazine, wished aloud that he had allowed the magazine to print and so face the consequences of violating the Atomic Energy Act. The *Post* editorial also provided its own picture of the *Progressive* editors' motives in mailing the Morland manuscript to Washington: "He, or *The Progressive*, in any case—in order, they now concede, to make sure they were *not* publishing classified information—submitted his manuscript to the government, saying that they wanted to see whether it was accurate." Even if Morland had seen no classified documents, the *Post* concluded, his article contained properly classified information. But Judge Warren's response was not appropriate, it argued: "Never before has a federal judge issued an injunction forbidding a newspaper to publish any-

thing, and this is not the time to start." To avoid such a calamitous outcome, the *Post* counseled *The Progressive* to agree to a negotiated settlement that would allow the magazine to publish a revised version omitting details to which the government objected. The public, the *Post* again asserted, did not need to know the details of bomb construction to discuss policy issues concerning nuclear arms.

Joining the *Post* in the middle position was the *Boston Globe*, which had at first taken a strongly pro-government position. On April 1 the *Globe* announced itself concerned about "what is generally terrifying about government censorship"—the Catch-22 of the case: there was no way to evaluate the judge's decision because even Morland's description of his research methods had been ruled secret.

A third defector from the ranks of the government's supporters after the injunction was the *Los Angeles Times*. Its April 5 editorial, which identified the author of the article in question as "Harold Morland," placed it squarely in the middle ground. It said that it wished the entire case had been finessed or—failing that—that the *Progressive* editors had accepted the proposed mediation panel. Almost fatalistically, the paper said it hoped that if the courts found for the government, the ruling would be narrow so that the precedent would be "tightly limited."

The editorials of the papers continuing in the centrist position after the March 26 injunction were noteworthy only for some of their suggestions. The *Milwaukee Journal* on March 28 admitted on the one hand that it thought the government had failed to meet the legal test of immediate and irreparable harm, and on the other hand urged *The Progressive* not to appeal the injunction. The *Miami Herald* of March 30 seemed to endorse the magazine's position by referring to a 1950 American Society of Newspaper Editors and *Bulletin of Atomic Scientists* study which concluded that there was no "secret" to the hydrogen bomb. But then the paper chided the magazine for "unwisely submitting its article to a government agency prior to publication" and thus threatening national security in a manner the editors never envisioned: legitimization of governmental censorship. According to the *Providence Journal*, which ran its first editorial on the matter on March 31, the magazine had "lamentably undermined its case and the all-too-fragile status of

press freedom and First Amendment rights" when it sent the story to government officials. "When those agencies studiously ignored its requests," the editorial continued, "the magazine pushed the issue by repeatedly asking for a response. This insistent twisting of the federal lion's tail finally got the inevitable response—a loud NO . . ." And that, the paper concluded, was where the issue should be left; especially since Justices Hugo Black and William O. Douglas had departed the Supreme Court.

The pro-government ranks after the March 26 injunction were reduced to the *Christian Science Monitor*, whose first editorial on the subject appeared March 28, and the *Washington Star*.

The *Monitor* found itself "... not convinced, (not yet, anyway) that the government does not have a case in pressing for 'prior restraint' on the grounds that publication of the H-bomb data 'would result in direct, immediate, and irreparable harm to the country.'" For the *Monitor*, the First Amendment was not necessarily to be valued over the possible loss of life: "If there is the possibility, however slight, that published information could make it easier for a nation to build the H-bomb, that fact ought to weigh heavily in deciding the First Amendment argument."

The *Star's* March 29 editorial had no apologies to make for Judge Warren. "Prior restraint of the press is an evil," it said. "But given the choice that faced Judge Warren, it is unarguably the lesser one." The paper spent much of its editorial reminding the *Washington Post* and others who counseled compromise that the magazine editors had already rejected the mediation panel approach. An absolutist view of the First Amendment, the *Star* said, left no room for the distinctions of degree involved in this case: "If the secrets of the world's most terrible weapon cannot be safeguarded from madmen, what secrets can be?"

Between the preliminary injunction and the government's dropping its efforts to block publication in September, numerous editorials on the subject continued to appear in the papers under consideration here. Only a few of those, however, constituted major shifts in position.

After the May 11 events at the Los Alamos Library, both the *Louisville Courier-Journal* and the *Milwaukee Journal* moved into the ranks of the *Progressive's* supporters. In the two months since the injunction, the *Courier-Journal* said on May 25, there had been

"a near-total meltdown of the government's case." The *Milwaukee Journal* on June 11 pronounced the government's case "shakier than ever" and advised Judge Warren to "very seriously consider lifting" his injunction. Admitting that it had once felt the *Progressive* editors "somewhat perverse" for their insistence on publishing the article, the *Journal* concluded that the Los Alamos developments gave the government "even less excuse to tamper with a basic freedom."

Although it did not represent a shift in overall position, an interim editorial by the *Washington Post* contained noteworthy departures from its previous arguments. The *Post* on June 19 asserted that the case had been "further complicated by what has become known as the 'classified at birth' theory." In sharp contrast to its previous editorials, the paper declared: "That theory is phony." Still, the *Post* found it hard to understand why *The Progressive* had wanted to publish bomb details and asserted that the magazine had itself precipitated the case by submitting its manuscript to the government. Better to have published it without negotiations, the *Post* argued. If the article contained "the secrets the government says it does," the paper said, the editors should be prosecuted under provisions of the Atomic Energy Act, and convicted, "if criminal provisions of the act are constitutional."

As the case approached the Court of Appeals in Chicago in early September, both the *Chicago Tribune* and the *Minneapolis Tribune* ran editorials attacking government proposals that oral arguments be conducted in secret. "If the Justice Department wanted to destroy confidence in the legitimacy of its cause, it could hardly have found a better way to do so than to ask that the public be excluded even from the courtroom debate over the meaning of the First Amendment" the *Chicago Tribune* observed on September 9. Identifying the Justice Department as a strong contender for an Orwell Award for Newspeak, the *Minneapolis Tribune* on September 11 indirectly dispatched the "voluntary" submission scenario: "And how is a citizen to know what thoughts are thus classified from birth? The only way is to ask the government—in effect to petition for a license to publish."

At the stage of the case at which the Appeals Court in Chicago began its considerations, then, the "scorecard" of editorials among

the 14 papers studied read: pro-*Progressive*, 5; pro-government, 2; middle ground, 7.

The announcement by the Justice Department that it was dropping its attempt to block publication of the *Progressive* article on September 16 produced two additional changes in editorial position among the newspapers studied—from the middle ground to the ranks of the magazine's supporters. The *Providence Journal*, which had earlier called the case a "very squishy" one to defend, said on September 19 that the government's dropping of the case "with no furious protests" amounted to a tacit admission that the danger entailed in publishing the article was imagined rather than real. The *Miami Herald* also abandoned the middle ground, concluding on September 28 that the actual danger of nuclear proliferation could be traced to the availability of weapons-grade fissionable material.

The *Washington Star* and the *Christian Science Monitor* remained staunchly opposed to publication to the end. *The Progressive* had "flirted provocatively" with secrecy provisions of the Atomic Energy Act, thus eroding "old understandings of the First Amendment," the *Star* said on September 21. The *Monitor* of September 19, although referring to some "inept conduct" on the part of the government, said the public had been left wondering if the press "... defiantly elevated the issue of First Amendment freedom to such absolute status that it is willing to risk damaging the U.S. national interest—and, in this case, even the safety of mankind?"

In the middle ground, the *Los Angeles Times* of September 19 and the *Boston Globe* of September 20 worried about the precedent of the two preliminary injunctions already issued in the case. The *Washington Post* on September 19 warned that a decision by the government not to prosecute whomever had been responsible for the Hansen letter reaching the *Press Connection* might turn the deterrence value of the Atomic Energy Act into "a sham." In that event, the paper warned, the government might be tempted to "ignore what it should have learned from this affair about protecting its secrets and rely even more on a dangerous system of ineffective prior restraints—which it should in fact abandon."

September 18 editorials by the *Milwaukee Journal*, the *Chicago Tribune* and the *St. Louis Post-Dispatch* and September 19 editorials by the *Des Moines Register*, *Minneapolis Tribune*, *New York*

*Times* and *Louisville Courier-Journal* continued to support the right to publish. All expressed concern that the question of the constitutionality of the prior restraint exercised in the case had not been settled. The *Courier-Journal*, conceding that criticism of the magazine's manner of bringing the matter to public attention might be warranted, concluded:

The value of the First Amendment, then, is not that it ensures publishers will act "responsibly," but that it guarantees the government won't determine what is or isn't printed . . . . That's what was at stake in the *Progressive* case. It's still at stake.

### *Professional Publications and Organizations*

*Editor & Publisher* was the first professional publication to take a position on the case. No matter which way the courts might rule, it concluded in a March 17 editorial, the *Progressive* case would prove detrimental to the cause of a free press. If the magazine backed off, the precedent of prior restraint would have been established. And if *The Progressive* appealed, the case might eventually reach the Supreme Court. That prospect, the trade journal agreed with many newspaper editorial writers, was not a favorable one:

There is an old lawyers' adage that "bad cases make bad law" and we feel this is one of those. No matter how right the author and his editors are in asserting all the information in the article is in the public domain, we believe the highest court probably supported by public opinion will sustain the Atomic Energy Act and we feel the press and the public will be the losers.<sup>128</sup>

By the time its September 22 editorial on the case appeared, *Editor & Publisher* had changed its position dramatically. "Withdrawal of the Department of Justice suit against *The Progressive* magazine seems to acknowledge that the H-bomb secrets the government was trying to protect were not secrets at all," the editorial said. It praised the magazine for its "persistence" in what had mostly been "a lonely fight," and attributed the collapse of the government case to the *Press Connection* publication of the Hansen letter and the *Chicago Tribune's* announcement of its intention to follow suit. Then it lectured other newspapers: "Newspapers of general circulation belatedly joined *The Progressive's* fight with *amicus curiae* briefs, but we wonder what might have happened had they been more demonstrative in their support like the *Chicago Tribune*."<sup>129</sup>

The first editorial treatment of the case by *Columbia Journalism Review* came in a "Comment" piece in the May/June 1979 issue of

the magazine. Although the piece was largely informational, spelling out both the legislative history of the Atomic Energy Act and the developing history of the case, it took an unmistakably pro-*Progressive* stand in concluding:

There should be no mistake about the character of this contest. It is political in nature, not technological and perhaps not even journalistic. The magazine's decision to publish was a political act. And as the battle of affidavits was waged before the March 26 ruling, it became clear that the government's response, too, was largely political.<sup>130</sup>

The writer also attempted to analyze the vehemence of newspaper editorials condemning *The Progressive*:

The reaction seemed to spring from something deeper, as if the magazine had violated a taboo, and touched on the untouchable. This is curious, to say the least, in an era when journalism has exposed in public print the inner secrets of the White House, the Military, and the intelligence establishment. Yet there has been a silent understanding, of thirty years' duration, between government and press, that journalists will not test the boundaries of nuclear secrecy. So little have these boundaries been challenged that *The Progressive*, in scheduling Howard Morland's investigation of the hydrogen bomb, apparently did not know until the last moment that the taboo was written into law.<sup>131</sup>

In its next issue, the *Columbia Journalism Review* carried a stronger "Comment" article which revealed that "quite by accident" the magazine had stumbled onto what its editors believed to be the "secret" of the H-bomb while researching the *Progressive* case!

(T)he heart of the "secret," the Teller-Ulam principle, concerns, first of all, the size, thickness, and geometry of certain bomb components, and second, their number and placement. The "secret" is modest in a certain sense . . . the trick is knowing how to direct the energy released by an atomic trigger so that it does not simply set off the bomb, but detonates it with precision.<sup>132</sup>

The "Comment" returned to the theme of a taboo, blaming the *Review* editors themselves and other journalists for having been all too content to delegate to leaders and experts the "right to know, and therefore the freedom to decide," about nuclear weapons matters:

We have chosen the risk of democracy, and it is time that we accept the risk of informing ourselves. *The Progressive* has broken the seal and ripped open the envelope, and that is an historic accomplishment. It may make us uneasy, but this is an anxiety we must learn to suffer.<sup>133</sup>

The article that followed, by Robert Friedman, formerly editor of the defunct journalism review *MORE*, was the most thorough examination of the case and Morland's motives to be published to

date. After analyzing both sides of the case carefully, he ended with a warning:

Will the Atomic Energy Act be allowed to consume the First Amendment? *United States v. The Progressive* is not the "bad case" that many in the media feared at the outset. It is the law itself—not the challenge to it—that is dangerous. What is at stake here is not the government's right to classify genuine military secrets, but the press's right to publish information it has obtained by legal means.<sup>134</sup>

Floyd Abrams, a lawyer who submitted an *amicus* brief supporting *The Progressive* on behalf of the *New York Times* and other news organizations, wrote a "Comment" piece for the November/December issue of the *Columbia Journalism Review*. Having finally read the Morland article, he said, he remained "unpersuaded that there is any persuasive editorial justification for publishing what the article characterizes as details of the 'secret' coupling device of which 'no description . . . has ever been made public.' " But, he added, there was no justification for confusing editorial judgments with legal ones: "The Atomic Energy Act remains a First Amendment minefield. It must be amended so as to prevent any interpretation such as the United States urged in the *Progressive* case."<sup>135</sup>

*Quill*, the organ of Sigma Delta Chi/Society of Professional Journalists, covered the case extensively in its April, June and July/August issues, but took no editorial position.<sup>136</sup> The July/August issue's report on organizational news noted that the national board of directors had declined to join in an *amicus curiae* brief supporting the magazine at its spring meeting and had decided to take no position on the case. The report also noted that the organization's Milwaukee chapter and the Chicago Headline Club had both passed resolutions supporting *The Progressive*.<sup>137</sup>

The May/June issue of the *Bulletin of the American Society of Newspaper Editors* carried an article by the Southbridge, Mass., newspaper editor, Loren Ghiglione, on the debate at the organization's annual convention over what position, if any, to take on the case. The article reviewed the positions of speakers on both sides of the issues at the convention: Knoll, Jeremy Stone, Bernard Feld and Prof. Albert Carnesale of Harvard. The latter argued that the Morland article would show some countries a "path shorter in time." In the end, the ASNE board of directors, upon the unanimous recommendation of the group's freedom of information committee, voted to file an *amicus* brief supporting *The Progressive's* appeal of the preliminary injunction. But, Ghiglione noted:

The cautious wording of the resolution reflected a debate that occurred earlier in the convention among members of the Freedom of Information Committee. Outgoing Fol chairman Anthony Day, editorial page editor of the *Los Angeles Times*, said that while he wanted ASNE to file a brief on the side of *The Progressive*, "I don't think the Society should be put in the position of saying, 'We support *The Progressive* no matter what.'" John J. McMullen, executive editor of *The Miami Herald*, said, "I think they (*The Progressive*) should have published and the hell with it. Then we would have had a case that we could support."<sup>138</sup>

At its annual convention in Houston in August, 1979, the Association for Education in Journalism adopted a resolution supporting *The Progressive*. The resolution stated that "such prior restraint erodes the First Amendment freedoms of all print and broadcast media . . . ."<sup>139</sup>

#### *Amicus Curiae Briefs*

In all, 40 journalism organizations or publications joined in friend-of-the-court briefs in support of *The Progressive's* appeal to the Court of Appeals in Chicago.

*Scientific American* was the only publication to file an individual brief. Based on decisions by the Supreme Court, the magazine's lawyers argued, one could conclude that the long-standing rule against prior restraint does not apply to the communication of information exclusively within the military sector. But the information the government was seeking to censor in this case, they contended, was in the civilian sector.<sup>140</sup>

The *New York Times*, The American Society of Newspaper Editors, the Association of American Publishers, the National Association of Broadcasters, the Association of American University Presses and the *Boston Globe* joined in another *amicus* brief. Their lawyers attacked as "perilous" Judge Warren's explicit reliance upon the "disparity of risk" involved in the case: "To focus on the danger of a mistake is to assure that the asserted national security interest must prevail in virtually all cases because of the greater weight the Court assigns—by hypothesis—to such interests," whether or not proven to exist.<sup>141</sup>

A third *amicus* brief joined in by 28 publications and organizations, many of which had endorsed a statement supporting *The Progressive* early in the case, reminded the appeals court judges that the affidavit by Hans Bethe on which Judge Warren had obviously placed great weight provided no factual support for his judgment that publishing the Morland article "would substantially hasten"

nuclear proliferation. Joining in that brief were: *The Nation*, *Columbia Journalism Review*, *Playboy*, *National Journal*, *New York*, *New West*, *Juris Doctor*, *Inquiry*, *Working Papers*, *New York Review of Books*, *The New Republic*, *New Engineer*, *Focus Midwest*, *The Village Voice*, *St. Louis Journalism Review*, *The Black Scholar*, *Rolling Stone*, *Editor & Publisher*, *The Witness*, *Sojourners*, *Texas Observer*, *American Lawyer*, *Cleveland Magazine*, *Seven Days*, *Transaction*, *I.F. Stone's Weekly*, American Booksellers Association and the Council for Periodical Distributors Associations.<sup>142</sup>

Three groups dedicated to protecting the rights of writers and civil liberties in general—the Committee for Public Justice, PEN American Center and the Authors League of America—joined in a fourth *amicus* brief. Like the drafters of the others, their lawyers argued that Judge Warren had not required the government to meet the burden of proof demanded by the First Amendment before issuing the preliminary injunction.<sup>143</sup>

A fifth *amicus* brief was filed by the *Chicago Tribune*, the Reporters Committee for Freedom of the Press and the Freedom to Read Foundation. Study of the public affidavits in the case, it told the appeals court judges, left lawyers for the three groups with “the distinct impression that the Government’s experts are prisoners of the classification system and are totally unaware of what information is or is not actually available in public sources.”<sup>144</sup>

#### CONCLUSIONS AND IMPLICATIONS

With the glorious advantage of hindsight, it is relatively easy to second-guess the *Progressive* editors at various stages of the controversy surrounding the Morland article. All such speculation is, of course, simply that, since it is impossible at this distance to understand the full panoply of factors with which they were dealing—or thought themselves to be dealing—at any one moment. Still, the history of the case is filled with suggestions that it might have developed quite differently had the editors, or their legal advisors, made a few pivotal decisions differently or explained those decisions more convincingly.

A case in point is their explanation of the decision to publish Morland’s article. As inappropriate as the question may have been in a court of law, Judge Warren was not the only person to question the editors’ apparent presumption that public understanding of the

issues of nuclear weaponry and its attendant security system required an understanding of the "secret" discussed in the article. Warren and the host of their fellow journalists who questioned the editors' judgment in that regard were not necessarily being either doctrinaire or obtuse. That the question itself survived to the very end of the debate over the case is evidence that the editors somehow failed to make sufficiently clear to the public the crucial connection they saw between the "secret" and their original purpose in commissioning the article. It was their intent, they have stated repeatedly, to demonstrate that much of the secrecy surrounding nuclear weapons is simply a political asset, not a military necessity. What better way to demonstrate overweening secrecy, they reasoned, than to point out that the "secret" the security system seemingly protected was no secret at all—that it was readily available through a number of unclassified channels to anyone with the determination to seek it out?

Instead, a large share of public attention came to focus on the government contention that the Morland article would give away the hydrogen bomb "secret." That was a development for which the editors themselves shared no little blame. It had been their decision, after all, to play up the spilled-secrets impression of the article, first with the editor's note when the manuscript was circulated to technical advisors, and then with the lead paragraph referring to a "secret" that several nations had gone to "extraordinary" lengths to protect. Certainly the "How an H-Bomb Works" caption for Morland's diagram could have done nothing to minimize security officials' concerns. Even the title "The H-Bomb Secret: How We Got It, Why We're Telling About It" does not seem completely devoid of an impression—even if unintended—of focusing attention on the revelation of a secret.

Another pivotal decision was made when the editors took their lawyers' advice and submitted the diagram, and later the complete manuscript, to Department of Energy officials. As a number of observers have noted, utter reliance upon the First Amendment would have led them to proceed with publication without ever contacting the government. In addition, including a request that government officials verify the accuracy of the information contained in the article may well have served to bolster the impression that a genuine nuclear secret was at risk. That submission certainly

gave government officials the grounds to announce, quite factually, if a bit self-servingly, that the article had been mailed to them by the magazine.

On the other hand, their failure to present the most convincing case possible was not entirely the fault of the magazine's editors. The performance of other journalists in reporting the case can only be described as lackluster. Granted, in the early hours of the story's existence the *Progressive* editors' evasiveness—founded upon their understanding that they were bound by an agreement not to discuss the case—resulted in those reporters who bothered to check with them receiving little understanding of the magazine's version of events. But even after the editors had spelled out their version of both the contents of the article and the manner in which the manuscript had reached security officials, many news stories and editorials continued to reflect largely the government's account, lending disappointing evidence of the tendency of many journalists to accept government statements unquestioningly, even in stories involving fellow journalists. To be sure, some reporters distinguished themselves in providing readers with valuable insights into the complexity of the case. And, as developments unfolded, there was a shift on the editorial pages of several newspapers to the side of *The Progressive*, a shift that seemed to evince greater understanding of that complexity.

On the whole, however, press performance was hardly encouraging, especially in view of the fact that reporters and editors were dealing with a case that so directly affected their craft. That is not to suggest, of course, that news coverage of the case should have been slanted to support the *Progressive's* position. It is to suggest that a case of such magnitude deserved more painstaking reporting than it received.

Exactly what the implication of *U.S. v. The Progressive* will be for the future practice of journalism in this country is difficult to ascertain, but two things are certain. First, American journalists can no longer labor under the assumption that they operate in a society entirely lacking an Official Secrets Act, whether or not current proposed legislation aimed at stopping "leaks" becomes law. The case has revealed with startling clarity the far-reaching implications of the Atomic Energy Act of 1954 for freedom of the press. And those implications are chilling, even if one makes allowance for the

fact that in the *Progressive* case, unlike the Pentagon Papers case, an official government position was never argued by the Solicitor General before the Supreme Court. In at least this case at least one group of Justice Department attorneys deemed it tactically feasible to argue that the Atomic Energy Act overrides the First Amendment where nuclear technology, military or civilian, is concerned. And those attorneys viewed the Act as giving the government the power to declare classified even the *thoughts* of its citizens concerning nuclear energy, an increasingly controversial subject journalists may well expect to be covering for years to come. Secondly, in a nation where prior restraint has been so uncommon as to be nearly non-existent, a publication has been enjoined for almost six months.

Nor is the likelihood of the *Progressive* case being raised as a precedent insubstantial. As noted here, within a year of the start of the Wisconsin case a private utility firm in Pennsylvania attempted to block publication of a newspaper article, citing provisions of the Atomic Energy Act. And Judge Warren, despite the eventual success of the magazine in publishing the Morland manuscript without deletions, ruled that neither side had prevailed. He pointedly refused to vacate his decision "in the interest of justice and furtherance of the development of the law." That makes his opinion available to other courts faced with a similar issue in the future.<sup>145</sup>

The *Progressive* case has served to heighten awareness of the conflict that exists between traditional First Amendment rights and provisions of the Atomic Energy Act. Until courts rule on the constitutionality of that law, as they did not in this case, the freedom of journalists to report on a vital area of national policy remains in doubt.

#### NOTES

<sup>1</sup> Press release, U.S. Department of Justice, Washington, D.C., Mar. 8, 1979.

<sup>2</sup> 42 U.S.C., 2014(y).

<sup>3</sup> Richard Hofstadter, William Miller and Daniel Aaron, *The United States* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1967), p. 825.

<sup>4</sup> 42 U.S.C., 2275, 2780.

<sup>5</sup> Statement of points for plaintiff in re U.S. v. *Progressive, Inc.*, et al, 467 F. Supp 990(1979).

<sup>6</sup> "The Press and Nuclear 'Secrets,'" *The Progressive*, December 1979, p. 34.

<sup>7</sup> Erwin Knoll, "Born Secret," *The Progressive*, May 1979, p. 16.

<sup>8</sup> *Milwaukee Journal*, Mar. 9, 1979, p. 6.

<sup>9</sup> Transcript of hearing on motion for temporary restraining order in re U.S. v. Progressive, Inc., et al., 467 F. Supp 990(1979), pp. 5-13. The troop ship matter was first raised in *Near v. State of Minnesota*, 283 U.S. 697(1931).

<sup>10</sup> *Ibid.*, pp. 19-22.

<sup>11</sup> *Ibid.*, 41-2.

<sup>12</sup> *Ibid.*, 32-3.

<sup>13</sup> *Ibid.*, 26-7.

<sup>14</sup> *Ibid.*, 45-8.

<sup>15</sup> *Ibid.*, 49-50.

<sup>16</sup> *Ibid.*, 51-3.

<sup>17</sup> *Wisconsin State Journal*, Mar. 10, 1979, p. 1.

<sup>18</sup> Memorandum and Order of Mar. 26 in re U.S. v. The Progressive, Inc., et al., 467 F. Supp 990(1979), p. 1.

<sup>19</sup> Brief of American Civil Liberties Union as Amicus Curiae in Support of Defendants in re U.S. v. The Progressive, Inc., et al., 467 F. Supp 990(1979).

<sup>20</sup> Memorandum and order of Mar. 26, p. 3.

<sup>21</sup> *Ibid.*, pp. 14-15.

<sup>22</sup> Transcript of hearing on motion for temporary restraining order, *op. cit.*, p. 90.

<sup>23</sup> *Washington Post*, Mar. 27, 1979, p. A7.

<sup>24</sup> Memorandum and order of Mar. 26, *op. cit.*, pp. 1-2.

<sup>25</sup> *Ibid.*, pp. 5-12.

<sup>26</sup> *Ibid.*, 11.

<sup>27</sup> *Ibid.*, 5-6.

<sup>28</sup> *New York Times*, Mar. 21, 1979, p. A 16.

<sup>29</sup> Affidavits of Hugh E. DeWitt, Ray E. Kidder, and Theodore A. Postol, in re U.S. v. The Progressive, Inc., et al., 467 F. Supp 990(1979).

<sup>30</sup> Jeremy J. Stone to *Progressive* staff, Mar. 12, 1979.

<sup>31</sup> Samuel H. Day, Jr., "Scientists of Conscience," *The Progressive*, May 1979, pp. 29-32.

<sup>32</sup> Statement of points for plaintiff, *op. cit.*, p. 6.

<sup>33</sup> Transcript of hearing, *op. cit.*, p. 89.

<sup>34</sup> Statement of points for plaintiff, p. 2.

<sup>35</sup> Press release of Mar. 8, *loc. cit.*

<sup>36</sup> Knoll, *loc. cit.*

<sup>37</sup> Day (personal communication).

<sup>38</sup> *Ibid.*

<sup>39</sup> Statement of points for plaintiff, p. 7.

<sup>40</sup> Transcript of hearing, pp. 7-8.

<sup>41</sup> Day, *loc. cit.*

<sup>42</sup> Knoll, *op. cit.*, p. 13.

<sup>43</sup> *Ibid.*, pp. 12-13.

<sup>44</sup> Howard Morland to *Progressive* staff, July 7, 1978.

<sup>45</sup> Knoll, *op. cit.*, p. 15.

<sup>46</sup> Memorandum and order of Mar. 26, p. 13.

<sup>47</sup> *Madison Capital Times*, Mar. 30, 1979, p. 2.

- <sup>48</sup> New York Times, Apr. 4, 1979, p. A-19.
- <sup>49</sup> New York Times, Apr. 6, 1979, p. A-14.
- <sup>50</sup> New York Times, May 12, 1979, p. 8.
- <sup>51</sup> Washington Star, Apr. 17, 1979, p. A-9.
- <sup>52</sup> Chicago Sun-Times, May 18, 1979, p. 1.
- <sup>53</sup> New York Times, May 23, 1979, p. A-17.
- <sup>54</sup> Washington Post, May 31, 1979, p. A-13.
- <sup>55</sup> Washington Star, May 17, 1979, p. A-1.
- <sup>56</sup> New York Times, June 3, 1979, p. E-9.
- <sup>57</sup> Los Angeles Times, June 8, 1979, p. 1.
- <sup>58</sup> Stipulation of June 8 in re U.S. v. The Progressive, Inc., et al., 467 F. Supp(1979).
- <sup>59</sup> Washington Post, June 9, 1979, p. A-1.
- <sup>60</sup> Memorandum and order of June 15, in re U.S. v. The Progressive, Inc., et al., 467 F. Supp 990(1979).
- <sup>61</sup> New York Times, June 15, 1979, p. C 19.
- <sup>62</sup> Order of Feb. 8, 1980 in re U.S. v. The Progressive, Inc., 467 F. Supp 990(1979).
- <sup>63</sup> New York Times, June 15, 1979, p. 12.
- <sup>64</sup> Day, "The Other Nuclear Weapons Club: How the H-Bomb Amateurs Did Their Thing," *The Progressive*, November 1979, p. 33.
- <sup>65</sup> Defendant's motion of June 22, to file petition seeking writ of mandamus to 7th Circuit Court in re U.S. v. The Progressive, Inc., et al., 467 F. Supp 990(1979).
- <sup>66</sup> Per curiam decision on writ of mandamus in re Howard B. Morland, et al., v. Robert A. Sprecher, Judge, U.S. Court of Appeals, et al. (1979).
- <sup>67</sup> Order of Sept. 10 in re U.S. v. The Progressive, Inc., et al., 467 F. Supp 990(7th Cir., 1979).
- <sup>68</sup> New York Times, Sept. 14, 1979, p. A-15.
- <sup>69</sup> U.S. v. Independent Berkeley Student Publishing Company, Inc. (order granting restraining order).
- <sup>70</sup> New York Times, Sept. 16, 1979, pp. 1, 30.
- <sup>71</sup> Madison Press Connection, Sept. 16, 1979, pp. 1-5.
- <sup>72</sup> New York Times, Sept. 17, 1979, p. 22.
- <sup>73</sup> Madison Press Connection, loc. cit.
- <sup>74</sup> Ibid., p. 5.
- <sup>75</sup> Press release, U.S. Department of Justice, Washington, D.C., Sept. 17, 1979.
- <sup>76</sup> Order of Oct. 28 in re U.S. v. The Progressive, Inc., 457 F. Supp 990(7th Cir., 1979).
- <sup>77</sup> "The 'Secret' Revealed," *The Progressive*, November 1979, p. 6.
- <sup>78</sup> Press release of Sept. 17, loc. cit.
- <sup>79</sup> Order of Oct. 1 in re U.S. v. The Progressive, Inc., et al., 467 F. Supp 990(7th Cir., 1979).
- <sup>80</sup> Memorandum in support of defendant's response to government motion to vacate, to dismiss, and to remand in re U.S. v. The Progressive, Inc., et al., 467 F. Supp 990(7th Cir., 1979).
- <sup>81</sup> Order of Oct. 1, loc. cit.

<sup>82</sup> Report to the court of Dec. 28 in re U.S. v. The Progressive, Inc., et al., 467 F. Supp 990(1979).

<sup>83</sup> Order of Feb. 8, 1980, *loc. cit.*

<sup>84</sup> Stipulation, Protective Order of Sept. 4, 1980, in re U.S. v. The Progressive, Inc., et al., 467 F. Supp(1979).

<sup>85</sup> Los Angeles Times, Sept. 5, 1980, p. 2.

<sup>86</sup> Plaintiff's memorandum of Feb. 1, 1980, in support of request for preliminary injunction in re Metropolitan Edison Company v. Fry Communications, Inc., et al., pp. 4-5.

<sup>87</sup> Memorandum order of Feb. 4, 1980, in re Metropolitan Edison Co. v. Fry Communications, Inc., et al., p. 3.

<sup>88</sup> Bruce Swain, "Neither Saints Nor Sinners: Initial Reporting of the Progressive Case," *Newspaper Research Journal*, 1:37-45 (May 1980).

<sup>89</sup> Washington Star, Mar. 14, 1979, p. A 3; Chicago Sun-Times, Mar. 14, 1979, p. 44; Washington Star, Mar. 15, 1979, p. A 11; Chicago Sun-Times, Mar. 22, 1979, p. 4; Chicago Tribune, Apr. 4, 1979, Sec. 5, p. 2.

<sup>90</sup> Newsweek, Apr. 4, 1979, p. 14.

<sup>91</sup> Memorandum and order of Mar. 26, *op. cit.*, p. 1.

<sup>92</sup> Douglas Kneeland, New York Times, Mar. 27, 1979, p. A-7; Morton Mintz, Washington Post, Mar. 27, 1979, p. A-7; Jeff Aikin, Milwaukee Sentinel, Mar. 27, 1979, p. 9.

<sup>93</sup> Los Angeles Times, Mar. 27, 1979, p. 5.

<sup>94</sup> Washington Star, Mar. 15, 1979, p. A 11; San Francisco Chronicle, Apr. 5, p. 58.

<sup>95</sup> Tribune, Apr. 2, 1979, Sec. 2, p. 1.

<sup>96</sup> Associated Press story by Tom Raum, Washington, D.C., Mar. 22, 1979.

<sup>97</sup> Associated Press story, Milwaukee, Mar. 23, 1979.

<sup>98</sup> Chicago Tribune, Apr. 12, 1979, p. 6.

<sup>99</sup> Janesville (Wisconsin) Gazette, Apr. 17, 1979, p. 1.

<sup>100</sup> Chicago Tribune, Apr. 2, 1979, p. 5.

<sup>101</sup> Swain, *op. cit.*, pp. 43-4.

<sup>102</sup> New York Times, Mar. 26, 1979, p. B-11.

<sup>103</sup> Wall Street Journal, Mar. 30, 1979, p. 25.

<sup>104</sup> New York Times, Mar. 18, 1979, p. A-24.

<sup>105</sup> New York Times, Apr. 30, 1979, p. B-12.

<sup>106</sup> Washington Post, Mar. 11, pp. 1, A-13.

<sup>107</sup> Madison Capital Times, Mar. 12, p. 1.

<sup>108</sup> New York Times, Mar. 18, 1979, p. A-24.

<sup>109</sup> New York Times, Mar. 26, 1979, p. 1.

<sup>110</sup> Chicago Tribune, Apr. 2, 1979, Sec. 2, p. 1.

<sup>111</sup> Washington Post, Mar. 11, 1979, p. A-13.

<sup>112</sup> Washington Post, Mar. 10, 1979, p. 4.

<sup>113</sup> Washington Star, Mar. 11, 1979, p. A-6.

<sup>114</sup> Milwaukee Journal, Mar. 20, p. 1.

<sup>115</sup> New York Times, Mar. 21, p. A-16.

<sup>116</sup> Milwaukee Journal, Mar. 25, p. 20.

- <sup>117</sup> Milwaukee *Sentinel*, Apr. 30, 1979, pp. 1, 8; May 1, 1979, p. 1.
- <sup>118</sup> New York *Times*, Sept. 14, 1979, p. A-15.
- <sup>119</sup> Memorandum and order of Mar. 26, *op. cit.*, p. 13.
- <sup>120</sup> New York *Times*, Sept. 18, 1979, p. 1.
- <sup>121</sup> Washington *Post*, Sept. 18, 1979, p. 1.
- <sup>122</sup> Wall Street *Journal*, Sept. 18, 1979, p. 1.
- <sup>123</sup> Chicago *Sun-Times*, Sept. 18, 1979, p. 1.
- <sup>124</sup> Washington *Post*, May 11, 1979.
- <sup>125</sup> Miami *Herald*, Mar. 19, 1979.
- <sup>126</sup> Milwaukee *Journal*, Mar. 13, 1979.
- <sup>127</sup> Louisville *Courier-Journal*, Mar. 15, 1979.
- <sup>128</sup> Editor & Publisher, Mar. 17, 1979, p. 6.
- <sup>129</sup> Editor & Publisher, Sept. 22, 1979, p. 6.
- <sup>130</sup> Columbia *Journalism Review*, May/June 1979, p. 27.
- <sup>131</sup> *Ibid.*, p. 26.
- <sup>132</sup> Columbia *Journalism Review*, July/August 1979, p. 22.
- <sup>133</sup> *Ibid.*, p. 23.
- <sup>134</sup> "The United States v. The Progressive," *ibid.*, p. 35.
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- <sup>143</sup> Brief of The Committee for Public Justice, et al, in Support of Defendants-Appellants in re U.S. v. The Progressive, Inc., *ibid.*
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- <sup>145</sup> Memorandum and order of Sept. 4, 1980, in re U.S. v. The Progressive, Inc., et al., 467 F. Supp 990(1979), p. 3.